Ong Teong Pin v Sim Kwan Meng & Anor

HIGH COURT (KUCHING) — SUIT NO KG95 OF 1988
RICHARD MALANJUM J
10 DECEMBER 1993

Professions *— Architects — Claim for balance of professional charges — Whether design services were completed as agreed — Whether assignor therefore entitled to payment*

Professions *— Architects — Claim for balance of professional charges — Assignor not registered as 'Architect' under Architects Act 1967 — Whether claim for fees could be allowed — Architects Act 1967 s 7(1)(c)*

The plaintiff, an architect and town planner in Singapore, was an assignee of a firm of architects ('the assignor') which had agreed to provide design consultancy services to WTS Konsultant ('WTS'), the principal consultants and architects of a hotel that was to be constructed in Miri, Sarawak. The defendants were partners in WTS. Of the contract sum of RM220,000, the plaintiff alleged that only RM80,000 had been paid and claimed the balance of RM140,000. The defendants in turn alleged that they had withheld payment because: (i) the assignor had failed to complete the design services as agreed; and (ii) the agreement was unenforceable due to s 7(1)(c) of the Architects Act 1967 ('the Act') as the assignor and/or plaintiff was not an 'Architect' within the definition of the term in the Act. The defendant also counterclaimed RM90,000 as additional labour and costs incurred due to the assignor's alleged breach. The issues before the judge were: (i) whether the assignor had indeed rendered the services and remained unpaid; and (ii) whether the agreement was unenforceable due to s 7(1)(c) of the Act.

Held, allowing the plaintiff's claim and dismissing the defendants' counterclaim:

(1) The defendants' assertion that the services were not completed was not supported by the documents tendered into evidence and, on the balance of probabilities, the assignor had rendered the services as agreed and was entitled to payment.

(2) The provisions of s 7(1) are meant to prevent bogus practice and are intended to protect the public from rogues and cheats. If a person is an architect by profession though not an 'Architect' as defined under s 7(1), then he is prohibited to do any acts or services expected of an architect except those provided under s 7(1)(a)–(c) of the Act. However, s 7(1)(c) only disentitles a person from recovering any fees for professional services rendered as an 'Architect'. Here, the assignor was in fact designated as a design consultant to WTS which was not an unwary member of the public and the services rendered by the assignor could not be

said to be within the scope of services rendered as an 'Architect' as defined in the Act. Thus s 7(1)(c) of the Act did not apply and the plaintiff was not prevented from suing for the amount owing.

(3) The defendants' counterclaim was dismissed as they had failed to prove it on a balance of probabilities.

Per curiam:

If s 7(1)(c) of the Act had applied to prevent the plaintiff from recovering his fees, the plaintiff would not have been able to invoke s 66 of the Contracts Act 1950 to circumvent it as the jurisdiction of the court would have been ousted either expressly or by implication.

[Bahasa Malaysia summary

Plaintif, seorang arkitek dan perancang bandar di Singapura, merupakan pemegang serahhak sebuah firma arkitek ('penyerahhak itu') yang telah bersetuju memberikan perkhidmatan pakar perunding reka bentuk kepada WTS Konsultant ('WTS'), iaitu pakar perunding utama dan arkitek untuk sebuah hotel yang akan dibina di Miri, Sarawak. Defendant merupakan rakan kongsi dalam WTS. Dari jumlah kontrak sebanyak RM220,000, plaintif mengatakan bahawa hanya RM80,000 telah dibayar dan menuntut baki sebanyak RM140,000. Defendan pula mengatakan bahawa mereka enggan membuat bayaran itu kerana: (i) penyerahhak itu telah gagal menyelesaikan perkhidmatan reka bentuk itu seperti yang dipersetujui; dan (ii) perjanjian itu tidak boleh dikuatkuasakan disebabkan oleh s 7(1)(c) Akta Arkitek 1967 ('Akta itu') kerana penyerahhak itu dan plaintif bukan seorang 'Arkitek' mengikut definisi perkataan tersebut di dalam Akta itu. Defendan juga menuntut balas untuk RM90,000 bagi kerja dan kos tambahan yang disebabkan oleh kemungkiran perjanjian yang dikatakan itu oleh penyerahhak itu. Isu di hadapan hakim adalah: (i) sama ada penyerahhak itu sebenarnya telah memberikan perkhidmatan itu dan masih belum dibayar; dan (ii) sama ada perjanjian itu tidak boleh dikuatkuasakan disebabkan s 7(1)(c) Akta itu.

Diputuskan, membenarkan tuntutan plaintif dan membuang tuntutan balas defendan itu:

(1) Penegasan defendan bahawa perkhidmatan reka bentuk itu tidak diselesaikan tidak disokong oleh dokumen yang dikemukakan sebagai keterangan dan, pada imbangan kebarangkalian, penyerahhak itu telah memberi perkhidmatan seperti yang dipersetujui dan berhak menerima bayaran.

(2) Peruntukan s 7(1) bertujuan menghalang amalan palsu dan melindungi orang awam daripada penyangkak dan penipu. Jika seseorang merupakan seorang arkitek walaupun tidak merupakan seorang 'Arkitek' sebagaimana yang ditakrifkan dalam s 7(1), beliau dilarang daripada melakukan sebarang perbuatan atau

perkhidmatan yang dijangkakan oleh seorang arkitek kecuali yang diperuntukkan oleh s 7(1)(a)–(c) Akta itu. Walau bagaimanapun, s 7(1)(c) hanya menghalang seseorang daripada mendapat balik sebarang fee untuk perkhidmatan profesional yang diberi sebagai seorang 'Arkitek'. Di dalam kes ini, penyerahhak itu pada hakikatnya telah dinamai sebagai seorang pakar perunding reka bentuk kepada WTS yang bukan merupakan orang awam yang tidak berhati-hati dan perkhidmatan yang diberikan oleh penyerahhak itu tidak boleh dikatakan termasuk dalam lingkungan perkhidmatan yang diberi sebagai seorang 'Arkitek' seperti yang ditakrifkan di dalam Akta itu. Dengan demikian, s 7(1)(c) Akta itu tidak terpakai dan plaintif tidak dihalang daripada mendakwa untuk jumlah yang dihutang.

(3) Tuntutan balas defendan dibuang kerana mereka gagal membuktikannya atas imbangan kebarangkalian.

Per curiam:
Jika s 7(1)(c) Akta itu terpakai untuk menghalang plaintif daripada mendapat balik feenya, plaintif tidak mungkin dapat menggunakan s 66 Akta Kontrak 1950 untuk memintasinya kerana bidang kuasa mahkamah akan disingkirkan secara nyata atau tersirat.]

[*Editorial Note*: The defendants have appealed to the Supreme Court vide Civil Appeal No 02–24–94.]

Notes
For cases on payment for work done, see 3 *Mallal's Digest* (4th Ed) paras 1363–1364.
For cases on architects, see 10 *Mallal's Digest* (4th Ed) paras 1144–1156.

Cases referred to
1 *Raymond Banham & Anor v Consolidated Hotels Ltd* [1976] 1 MLJ 5 (distd)
2 *Gunung Bayu Sdn Bhd v Syarikat Pembinaan Perlis Sdn Bhd* [1987] 2 MLJ 332 (refd)
3 *Rhodesia Metals Ltd (In Liquidation) v Taxes Commissioner* [1940] 3 All ER 422 (refd)
4 *Chong Khee Sang v Pang Ah Chee* [1984] 1 MLJ 377 (refd)

Legislation referred to
Architect Acts 1967 ss 2, 7, 10(2)

Anthony Phua (*Yong & Co*) for the plaintiff.
Lee Heng Chong (*HC Lee & Co*) for the defendants.

Cur Adv Vult

Richard Malanjum J:

A *The claims*

This is an action for the recovery of payment for services rendered. The plaintiff, an assignee of Archiplan Team (hereinafter referred to as 'the assignor') by virtue of an assignment dated 19 December 1986 and the defendant having been duly notified by a letter on even date, is claiming the following:

(1) the sum of RM140,000 and the sum of S$1,396.78 (equivalent to RM1,803.24 @ RM129.10 [per S$100] as at 20 May 1988);
(2) interest thereon at the rate of 8%pa from the date of judgment until full payment; and
(3) costs.

The defendants who were partners in a firm of architects known as 'WTS Konsultant' (hereinafter referred to as 'WTS') are refusing to pay on the grounds that:

(a) the assignor had failed and/or omitted to perform the services as per the agreement dated 6 December 1984 (hereinafter referred to as 'the said agreement'); and
(b) the said agreement cannot be enforced in the light of s 7(1)(c) of the Architects Act 1967 as amended (hereinafter referred to as 'the said Act') as the assignor and/or the plaintiff was not registered in Malaysia under the said Act. There is also a counterclaim of the defendant for the sum of RM90,000 alleging additional labour and costs incurred as a result of the breach by the assignor of the said agreement.

B *The issues*

From the evidence adduced, I am of the view that the dispute should be determined with the following issues in sight, namely:

(i) whether the services were rendered and remained unpaid; and
(ii) whether the said agreement was unenforceable due to s 7(1)(c) of the said Act.

I shall deal with the counterclaim later.

C *Issue (i)*

The evidence

It is the case for the plaintiff that he is an architect and town planner by profession in Singapore and has been in private practice for more than 20 years. He was a senior partner in the assignor in 1984 which was later dissolved towards the end of 1986. It was also the evidence of the plaintiff that the first defendant made an offer vide exh P1 to his partner in the assignor and which

was duly accepted in the form of exh P2. Subsequently details of the scope of consultancy with terms and mode of payments were written by the plaintiff to the first defendant vide exh P3. The end product was the execution of the said agreement which was admitted as exh P4. From the contents of exh P4, it was shown that the assignor was the design consultant whilst WTS was the principal consultant. According to the plaintiff, the assignor was expected to provide an overall image of the proposed hotel building in Miri, Sarawak and the functional arrangement of the rooms and public areas of the building. In addition, the assignor was also to work out the special and functional arrangement for the operation aspect of the intended hotel, commonly known as the back of the house facilities.

It was also admitted in evidence, vide exh P5, an artist's impression of the design concept of the intended hotel building, Holiday Inn, Miri, Sarawak. The plaintiff further said that the design concept, which was done in Singapore, was presented and explained to the developer of the hotel building, Insan Sejati Sdn Bhd. The concept was subsequently accepted by the developer and the defendants. It is also the testimony of the plaintiff that based on the design of a design consultant, a project architect would do the detail plans. In this case, the plaintiff said that it was the responsibility of the defendants to ensure that the building byelaws had been complied with. And by a letter dated 16 July 1986, vide exh P6, the plaintiff said that he confirmed to the defendants that all works up to the design development stage had been done by June 1985. But out of the sum of RM220,000 payable, only RM80,000 had been paid leaving a balance as claimed. The plaintiff also contended that the defendants never brought to his attention that there was unfinished design work.

Under cross-examination, the plaintiff said that exh P4 entailed that the assignor had to be a firm of architects in Singapore and it required the drawing up of architectural plans. He also confirmed that the plans drawn bore the name of the assignor but who was described as a design consultant. When asked about the balance of work as stated in exh P8, the plaintiff explained that there were four parts to the scope of works stated in the said agreement (exh P4) and of which the first two parts were the preliminary concept stage and design and development stage.

The plaintiff also said that these first two stages were completed and entitled to the payment of RM220,000. He said that the assignor was not called on to perform the remaining two stages, namely, the building plans and tender stage and construction stage.

The plaintiff denied that the reason why he agreed to accept 50% of the sum claimed earlier was because the assignor failed to completely perform the terms of exh P4. The plaintiff had earlier explained that he agreed to accept 50% of the sum in order to allow him to close the file as the assignor had been dissolved and, since the debt had been long outstanding, a reduced sum would enable the defendants to pay as soon as possible.

For the defendants on issue (i), the first defendant testified that the assignor, pursuant to exh P4, was required to do the following:

(i) to prepare outline drawings on a 1:100 scale for the incorporation of all the reguirements of the government departments in relation to building byelaws; and
(ii) to liaise with the relevant government departments and the local authority concerning the byelaws.

The first defendant admitted that the outline drawings were done by the assignor. He further said that out of the four stages stipulated in exh P4, the assignor had done Stage A and No 1 of Stage B but not No 2 of Stage B. But the first defendant also claimed that the defendants provided input in No 1 of Stage B worth RM40,000. As for his explanation for not making any written complaint for the work not completed, the first defendant said that he did not do so as he had already spoken by telephone to the plaintiff on the matter.

On the sum claimed by the plaintiff, the first defendant produced exhs D1, D2 and D3 to substantiate his evidence that after 1986, a further sum of RM10,000 was paid to the plaintiff.

On being cross-examined, the first defendant replied that he had also submitted the conceptual design plan to the local authority. But he admitted that there was nothing in exh P4 requiring submission of plans to be done by the assignor. There was only the incorporation of the requirements [under the] building byelaws. He further said that the compromised fee of 50% was agreed by him even though the work was not completed. He also claimed that the developer had only paid him 70% for the completed detail design stage.

When questioned by the court, the first defendant said that exh P4 was a complete agreement with all the terms therein. The parties would only have to comply with the terms therein and that would be sufficient.

D *The findings of the court*

(1) Issue (i)

Having heard the evidence both from the plaintiff and the first defendant and after perusing the documentary exhibits including those in the agreed bundle A, it is my finding that on the balance of probabilities, the assignor had rendered the services which remained unpaid and the plaintiff, as assignee, is entitled to the payment. My reasons for coming to such a finding are as follows:

(i) I am unable to accept the explanation of the first defendant that he only complained of the non-completion of the works by the assignor by way of telephone. From the exhibits presented, including letters from the first defendant and his solicitors, the issue of non-completion of work was never brought up. In fact it was only on filing their defence that the defendants came up with such an allegation. Being professionals, I do not think the defendants would have left to the last such an allegation if there was any truth in it. In particular, the defendants did not make any attempt at all to refute the contents of exh P6;

(ii) the plaintiff said that the defendants never brought any unfinished work to his attention and the first defendant did not deny that the plaintiff was not informed except for the telephone conversation which, from the evidence of the first defendant, took place only on 23 April 1987. But on perusal of pp 38 and 39 of A (the agreed bundle of documents) I believe the plaintiff in that he was not informed at all;

(iii) the first defendant, when confronted with exh P6, did not dispel its effect (except by his bare assertion and denial) by any other evidence indicating that they did the uncompleted work;

(iv) exhibit P4 is also clear as to the obligations of the assignor. The first defendant said that the assignor was to liaise with the local authority and government departments regarding the byelaws. But I find no specific provision to that effect. Thus, having regard to exh P4 and the evidence of the first defendant, I am in grave doubt if the first defendant knew exactly the responsibilities of each party at the material time; and

(v) I am also satisfied with the explanation of the plaintiff as to why initially he agreed to accept 50% of the fees payable having considered the evidence of the first defendant and the inferences that can be drawn from pp 38 and 39 of bundle A. These were the telex messages from the first defendant to the plaintiff and vice versa. Nothing was mentioned about the unfinished work except the intention to close the file. From my reading of p 39 of bundle A it shows that what the plaintiff said in court as being his reasons for accepting only 50% of the sum payable was not an afterthought or any flimsy excuse.

(2) Issue (ii)

This issue appears to be the main thrust of the defence.

Section 7(1) of the said Act reads:

> No person shall unless he is an Architect —
>
> (a) practise or carry on business or take up employment as an architect;
> (aa) do so under any name, style or title —
>
> (i) bearing the word 'Architect' or the equivalent thereto in any other language; or
> (ii) bearing any other word whatsoever in any language which may reasonably be construed to imply that he is an Architect;
>
> (b) use or display any sign, board, card or other device representing or implying that he is an Architect; or
> (c) be entitled to recover in any court any fee, charge or remuneration for any professional advice or services rendered as an Architect.

It was the contention of the learned counsel for the defendants that in view of the said s 7(1)(c), the said agreement (exh P4) could not be enforced as the assignor at the material time was not registered under the said Act and neither was the plaintiff registered as an architect within the definition as given in s 2 of the said Act. He cited the case of *Raymond Banham & Anor v Consolidated Hotels Ltd.*[1]

Section 2 of the said Act defines the word 'Architect' thus: '"Architect" means a person registered under Section 10(2).' And s 10(2) of the said Act reads:

> Subject to the provisions of this Act the following persons shall be entitled on application to be registered under Section A of the Register as Architects —
>
> (i) any person who —
>
> (a) is a registered Architectural Graduate;
> (b) has obtained the practical experience as prescribed under subsection (1)(b); and
> (c) is a Corporate Member of the Pertubohan Akitek-Akitek Malaysia or has obtained a qualification which the Board considers to be equivalent thereto;
>
> (ii) any person who on the appointed date is registered under Part I of the Architects Ordinance 1951;
> (iii) any person who was a Corporate Member of the Pertubohan Akitek-Akitek Malaysia immediately before the appointed date and who applies for registration within 12 months of that date and on the date of application is a Corporate Member of the Pertubohan Akitek-Akitek Malaysia;
> (iv) any person who satisfies the Board that he was practising or was carrying on business or was employed as a bona fide architect in East Malaysia for at least 12 months before the appointed date and who applies for registration within 12 months of that date; and
> (v) any person who on the appointed date is a Graduate Member of the Pertubohan Akitek-Akitek Malaysia or is eligible to become such a Member and is employed as an architect in the Federation and who applies for registration within 12 months of the appointed date and on the date of application is a Corporate Member of the Pertubohan Akitek-Akitek Malaysia or has obtained a qualification which the Board considers to be equivalent thereto.

Thus for the purposes of the said Act the term 'Architect' with a capital 'A' has a special meaning ascribed to it. (See *Gunung Bayu Sdn Bhd v Syarikat Pembinaan Perlis Sdn Bhd.*[2]) Accordingly, if a person is not an 'Architect' as defined, he is not permitted to do those activities as stated in s 7(1)(a)–(c). Further, on closer reading of s 7(1)(a)–(b), it appears to me that those provisions are meant to prevent bogus practice and anyone masquerading as an 'Architect' resulting in the existence of a probable 'client–"Architect"' relationship. In short those provisions in my view, are intended to protect the public from rogues and cheats.

But if a person is an architect by profession though not an 'Architect' as defined, then I do not think he is prohibited to do any acts or services expected of an architect except those provided under s 7(1)(a)–(c) of the said Act.

Further, s 7(1)(c) only disentitles a person to recover in any court any fee, charge or remuneration for any *professional advice or services rendered as an 'Architect'* with a capital 'A'. Thus the advice or services must have been given or done while such person conducted himself as if he was an 'Architect' as defined.

A In the present case, exh P4 does not reflect a 'client–"Architect"' relationship. The assignor was in fact designated as design consultant to provide consultancy services to WTS in which the defendants were partners. WTS was the principal consultant and not a mere unwary member of the public. The copyright of all drawings done by the assignor was also to remain with the principal consultant. Certification and submission of plans B to the relevant authorities were also done by WTS. Further, on perusal of the scope of consultancy services expected of the assignor, I think it entailed mainly the preparation of design drawings. Based on the foregoing and having considered the actual work done by the assignor, I do not think therefore that it could be said that the services rendered by the assignor to C WTS were within the scope of 'services rendered as an "Architect"' (with a capital 'A'). Accordingly, I hold that on the facts of this case, s 7(1)(c) of the said Act does not apply.

In my view, *Raymond Banham*'s case[1] does not offer much help to the defendants. The facts of that case are quite different. In the first place, the plaintiffs in that case were actually dealing directly with a client and not on D a consultancy basis. Secondly, that case was dealing with a provision in a different statute which is not in pari materia with the provision under consideration. In *Rhodesia Metals Ltd (In Liquidation) v Taxes Commissioner*,[3] Lord Atkin at p 425H said that 'decisions on the words of one statute are seldom of value in deciding on different words in another statute ...'.

E Thirdly, the court in that case found as a fact that the plaintiffs were carrying out professional engineering work as defined under the Singapore Professional Engineers Act of 1970 (Cap 225). Lastly, there was a finding of illegality of the contract in that case as the statutory provision provided for the imposition of a penalty for any contravention. In the present case, there is no provision for penalty in the event of any breach of the specific F statutory provision.

On the issue of s 66 of the Contracts Act 1950 raised by the learned counsel for the plaintiff, I do not think it is necessary for me to consider it in view of my ruling on the non-applicability of s 7(1)(c) of the said Act. Suffice to say that assuming s 7(1)(c) is applicable, then I do not think s 66 G of the Contracts Act 1950 can be used to circumvent the clear provision. It is in my view apparent that by s 7(1)(c), the jurisdiction of the court has been ousted expressly or by implication.

E *The counterclaim of the defendant*

H The first defendant testified that the cost of input for item No 1 of Stage B under the scope of consultancy services pursuant to exh P4 which had to be done by the defendants was RM40,000. But aside from making such an assertion, no evidence was adduced. Further, no explanation was given as to what the input was. As for the balance of the counterclaim which is RM50,000, nothing at all was said or adduced. There is a reference to the I issue at pp 77 and 78 of bundle A but I do not think they are of much help to meet the standard of proof. In the first place, I do not understand why these two pages were added to bundle A when they should have been put in the bundle of pleadings. Secondly, their contents do not prove anything.

It is settled law that when a claim is made it must be substantiated by relevant and admitted evidence. (See *Chong Khee Sang v Pang Ah Chee.*[4])

Conclusions and order

(i) Plaintiff's claim

In view of my findings on issues (i) and (ii) above, I am satisfied on the balance of probabilities that the plaintiff has proved his case. But I will make the following orders:

(a) the payment of the sum of RM130,000 as I am satisfied from the documents admitted that the plaintiff had been paid the sum of RM10,000 after 1986 as per exhs D1 and D2;
(b) the payment of the sum of RM1,803.24;
(c) interest at the rate of 8% from the date of judgment to the date of full payment; and
(d) costs.

(ii) Defendant's counterclaim

As I am not satisfied that the defendants have proved their counterclaim on the balance of probabilities by reasons as given above, I dismiss it.

Order accordingly.

Reported by Anne Khoo